

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

CINCINNATI SPORTSERVICE, INC.

9-CA-45165

9-CA-45197

and

CHICAGO AND MIDWEST REGIONAL  
JOINT BOARD, WORKERS UNITED,  
SEIU

*Eric V. Oliver, Esq.* for the General Counsel.

*Craig M. Brown, Esq., (Littler Mendelson)* Cleveland, Ohio, for the Respondent.

*Ronald Willis, Esq., (Dowd, Block & Bennett)* Chicago, Illinois, for the Charging Party

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on January 19, 2010. The Chicago and Midwest Regional Joint Board, Workers United, SEIU filed the charge in 9-CA-45165 on September 10, 2009 and the charge in 9-CA-45197 on September 28. The General Counsel issued Complaints in both cases and then consolidated them for hearing on November 25, 2009.

The General Counsel alleges that Respondent is violating Section 8(a)(5) and (1) of the Act by refusing to pay to the Chicago and Midwest Regional Joint Board, Workers United, SEIU, (hereafter, "Joint Board"), agency fees equal to the regular monthly dues deducted from the wages of unit employees.<sup>1</sup> Respondent contends that it has been caught in the middle of dispute between the Joint Board, Workers United, SEIU, on the one hand, and UNITE HERE, on the other, as the result of contested disaffiliation of the Joint Board from UNITE HERE. Thus, Respondent contends it does not know which entity is entitled to these funds. Since the beginning of the 2009 major league baseball season, Respondent has been placing the representation fees it deducts from its employees into an escrow account. It informed the Charging Party that it was doing so on September 8, 2009.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and Charging Party, I make the following

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<sup>1</sup> Respondent's organized employees have never been "members" of the labor organization that represents them. This is so because they are seasonal employees and do not pay monthly dues for the periods in which they are not working.

<sup>2</sup> The General Counsel's unopposed March 3, 2010 motion to re-open the record, and to amend the Complaint to conform to the evidence, is granted. Thus, the matters stipulated to by the parties on February 22, 2010 are deemed part of this record.

## Findings of Fact

## I. Jurisdiction

5           The Respondent, Cincinnati Sportservice, Inc., a corporation, is a subsidiary of the Delaware North Companies. It operates the food and beverage concession stands, and employs the vendors<sup>3</sup> at the Great American Ballpark, home of the Cincinnati Reds major league baseball team. In the year prior to the issuance of the Complaint, Respondent derived gross revenues in excess of \$500,000 and purchased and received at its Cincinnati facility, goods valued in excess of \$50,000 directly from points outside of the State of Ohio. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Chicago and Midwest Regional Joint Board, Workers United, and Local 12 are labor organizations within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

*The recent history of the representation of Respondent's employees<sup>4</sup>*

20           Prior to 2004, Respondent's vendors and concession stand workers were represented by Local 12, HERE.<sup>5</sup> In 2004, HERE merged with UNITE<sup>6</sup> to form UNITE HERE. In 2005, Local 12 affiliated with the Chicago and Midwest Regional Joint Board of UNITE HERE.

25           The affiliation agreement between Local 12 and Chicago and Midwest Regional Joint Board UNITE HERE provides in paragraph 6, Continuity of Representation:

30           The current officers and stewards of Local shall retain their positions and hold office in accordance with Local's constitution. It shall remain the responsibility and prerogative of Local officers and stewards to administer current collective bargaining agreements of Local, with the assistance and support of representatives of the Joint Board, where appropriate...

G.C. Exh. 14, pg. 4.

35           In practice, however, after the affiliation, the Joint Board assumed all responsibility for dealing with Respondent with respect to the two bargaining units and two collective bargaining agreements covering Respondent's employees. One agreement covered the vendors and the other covered the concession stand employees. The officers of Local 12 became employees of

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40           <sup>3</sup> These are the employees who walk through the grandstand selling hot dogs, beer, etc.

45           <sup>4</sup> Although there is quite a bit of evidence regarding the history of Local 12, the Joint Board, Local 12's affiliation with the Joint Board, and the merger of UNITE and HERE prior to 2009. I view most of the evidence to be of marginal significance to this case. It is undisputed that between 2006 and early 2009, Respondent never questioned the Joint Board's status as bargaining representative of its employees or its entitlement to the agency fees deducted from the paychecks of Respondent's employees. The only issue in this matter is whether the contested disaffiliation of the Joint Board from UNITE HERE in 2009 created a genuine issue of representation that entitled Respondent to escrow these funds.

50           <sup>5</sup> HERE stands for Hotel Employees and Restaurant Employees International Union.

<sup>6</sup> UNITE is apparently the official name of the Union. At one time UNITE stood for United Needle and Industrial Trades Employees.

the Joint Board.

As a result, Local 12 ceased to have any full time employees. At the end of 2005, the Joint Board terminated Dennis Hyden, who as President of Local 12 UNITE HERE, signed the affiliation agreement. Local 12's current President, Gina Hyde, is an employee of a signatory contractor at the Cincinnati airport. She was elected by the membership of Local 12.

Since 2005, Respondent's employees have been represented by business representatives employed by the Joint Board. Business Representatives Bishaara Clark and John Price have generally represented Respondent's employees with respect to grievances. Joint Board Special Projects Coordinator Mark Milko has been the bargaining unit's principal negotiator with respect to contracts.

The Joint Board business representatives have selected the union stewards for Respondent's employees. These stewards have also been involved in the Union's processing of grievances and in collective bargaining negotiations. Richard Wurzbacher, an employee of Respondent since 1989, has been the union steward for the vendors since 2006. However, for as many as 15 years prior to 2006, Wurzbacher participated in collective bargaining negotiations with Respondent. Wurzbacher also served as steward for concession stand employees until Marsha Marshall became their steward in 2009. Marshall attended contract negotiations in mid-2009.

Vann Seawell, the Assistant Director of the Ohio Council of the Chicago and Midwest Regional Joint Board, signed a collective bargaining agreement with Respondent covering the concession stand workers in 2006 on behalf of UNITE HERE Local 12, an affiliate of the Chicago and Midwest Regional Joint Board of UNITE HERE. In March 2007, Respondent signed an extension of the vendor's collective bargaining agreement.

Vann Seawell also signed that extension for the Union on behalf of Local 12 UNITE HERE. In July 2007, Respondent signed a memorandum of agreement with UNITE HERE, Chicago and Midwest Regional Joint Board and its affiliated Local 12 further extending the vendor's collective bargaining agreement to March 2008. Mark Milko signed this memorandum for the Union. In March 2008, Milko, business representative John Price, and union steward Richard Wurzbacher signed a collective bargaining agreement for the vendors for the period March 2008 to March 2011.

Respondent's bargaining unit members are not members of the Union and do not have voting rights. This is because they are employed only for the baseball season, early March to late September or early October. Instead of dues, they remit an "agency fee" per event worked. From 2005 until sometime in 2009, Respondent deducted this fee from employees' paychecks and remitted it to the Joint Board in St. Louis. During the entire 2009 baseball season, Respondent placed these fees in an escrow account. It informed the Joint Board of this fact on September 8, 2009.

#### *The Disaffiliation from UNITE HERE*

On March 7, 2009, delegates to a meeting who were elected by local unions that are members of the Joint Board, voted to disaffiliate the Joint Board from UNITE HERE. The Chicago and Midwest Regional Joint Board, together with Joint Boards in other geographical areas formed Workers United soon thereafter. Noel Beasley, the manager of the Joint Board, informed Respondent of the disaffiliation and the formation of Workers United in March. He also informed Respondent that Local 12 remained affiliated with the Joint Board and that the Union

expected Respondent to continue its collective bargaining obligations with the Joint Board.<sup>7</sup>

Respondent also received letters as early as March 26, from John Wilhelm advising it that UNITE HERE deemed the disaffiliation invalid. On April 20, Wilhelm wrote Respondent and other employers advising them not to remit dues to the Joint Board. He suggested they remit dues either to the local union servicing their bargaining units or place the money in escrow. Subsequently, Wilhelm warned Respondent and other employers that they may end up paying UNITE HERE for dues that in his view, was unlawfully remitted to Workers United and/or its Joint Boards.

In February 2009, before the Joint Board disaffiliated with UNITE HERE, the Executive Board of Local 12 passed a resolution to disaffiliate from UNITE HERE. At a membership meeting in April 2009, attended by only 10 members of Local 12, Local 12 reaffirmed the February resolution. Although Local 12 members were notified of the April meeting by postcard and by notices posted at their workplaces, Respondent's employees were not sent these postcards because they are not members of Local 12. Notices regarding the meeting were not posted at the Great American Ballpark.

*Relationship between Respondent and the Union after April 2009*

Respondent contends that it stopped remitting the agency fees to the Union and began placing them in an escrow account in order to await a judicial determination as to whether the Joint Board or UNITE HERE is entitled to these funds. However, Respondent has continued to recognize the Joint Board representatives as collective bargaining representatives of its employees in many other respects.

In June 2009, Respondent signed an extension of the collective bargaining agreement for concession stand workers. This extension is for the period January 1, 2009 through December 31, 2011. Mark Milko signed for the Union. The Memorandum of Agreement extending this contract states that it is between Respondent and "Chicago [and] Midwest Regional Joint Board affiliated with Workers United Union/SEIU (the Union)." There is no reference to UNITE HERE in this agreement.

Respondent has also recognized and bargained with the Union regarding grievances. Respondent's Human Resource Manager Ashley Noel has communicated and negotiated with Joint Board Business Representative Bishaara Clark and Union Steward Richard Wurzbacher since the disaffiliation over grievances, just as she had prior to the disaffiliation. She also provided Clark with a seniority list for Respondent's vendors.

An example of Respondent's continuing recognition of the Union occurred in the fall of 2009. Joint Board Business Representative Bishaara Clark was processing a grievance on behalf of a unit employee who was disciplined for selling an alcoholic beverage to a customer without determining that the customer was legally permitted to purchase it. This employee sold the beverage to one or more "secret shoppers" employed by Respondent to monitor compliance of its vendors with the law. Clark asked to meet the "secret shoppers." Respondent arranged the meeting. As a result, Clark determined that the "secret shoppers" appeared to be much too young to purchase alcohol without providing proof of their ages. Thereafter, the Union decided not to take the grievance to arbitration. No officials of Local 12 played any role in this decision.

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<sup>7</sup> On March 22, 2009, Workers United affiliated with the Service Employees International Union (SEIU).

*Respondent's contact with UNITE HERE since the disaffiliation*

In 2009, UNITE HERE President John Wilhelm sent several letters to Respondent and other employers demanding that employee dues payments either be remitted to UNITE HERE or placed in escrow until litigation regarding the disaffiliation of the Joints Boards from UNITE HERE has been concluded. Respondent has had no other recent contact with representatives of UNITE HERE.

*Analysis*

The threshold issue in this matter is whether the facts in the case should be analyzed pursuant to the "continuity of representation" doctrine, as advocated by the General Counsel and Charging Party, or, on the other hand, pursuant to the "schism doctrine," as advocated by Respondent. I conclude that the proper mode of analysis is whether or not there has by continuity of representation by the Joint Board and that the schism doctrine is not applicable to this case.

The lead case on the schism doctrine is *Hershey Chocolate Corp.*, 121 NLRB 901 (1958). In *Hershey Chocolate*, the employer, unlike the Respondent in the instant case, filed an RM petition with the Board asking it to conduct a representation election to determine which of two competing unions it was obligated to recognize. Both unions contended that because the employer was bound by a collective bargaining agreement which had not expired, the employer's RM petition should be dismissed. The Board held that it had authority to direct an election and did so.

The Board in *Hershey* began its discussion by noting that, "the schism issue arises in the context of an existing contract which would otherwise achieve the statutory objective of promoting industrial stability and therefore under normal Board practice would remain a bar for the balance of its reasonable term...Accordingly, before directing an election on the basis of an alleged schism, the Board must be satisfied that the existing contract can no longer serve to promote industrial stability, and the direction of an election would be in the interests of achieving industrial stability as well as in the interests of the employees' rights in the selection of their representative."

Given the Board's primary concern for promoting industrial stability, there is no reason to apply the schism doctrine to the instant case.<sup>8</sup> With the exception of placing employee agency fees in escrow, Respondent has continued to recognize and bargain with the Joint Board as the bargaining agent as its employees. Respondent cannot claim that it is confused as to which labor organization represents its employees; its conduct since the disaffiliation belies any such contention. Moreover, UNITE HERE has never claimed to represent Respondent's employees apart from the Joint Board and has never made an attempt to do so.

Respondent contends that there is no harm in allowing it to escrow fees until there is a final determination regarding the disaffiliation. That is simply not so. There is an economic cost to the representation services the Joint Board provides to Respondent's employees. To the

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<sup>8</sup> Indeed, footnote 5 at page 9 of Respondent's brief comes very close to conceding that the purposes of the statute are best served by requiring Respondent to treat the Joint Board as the exclusive bargaining representative of its unit employees in all respects. Respondent notes that it signed the memorandum of agreement with the Union in June 2009 because "all the Company sought was labor peace and stability while it waited for resolution of the intra-union dispute."

extent that the Union is denied the funds to which it is entitled, its ability to represent Respondent's employees is compromised.

Moreover, the question of whether there is any harm in Respondent's putting its employees' fees into an escrow account is somewhat beside the point. Its refusal to remit the agency fees to the Joint Board and its decision to place the sums in an escrow account violate Section 8(a)(5) and (1) of the Act assuming that the Joint Board is the exclusive bargaining representative of Respondent's employees, *J.W. Fergusson & Sons*, 299 NLRB 882, 890-91 (1990); *Mays Department Stores Co.*, 289 NLRB 661 (1988).

The Board has held that the general test for determining whether the affiliation of a bargaining representative with another labor organization raises a question concerning representation is whether the affiliation produces a change that is "sufficiently dramatic to alter the union's identity," *Mays Department Stores, Co.*, *supra* and cases cited therein, *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB 143 (2007).<sup>9</sup> While *Mays* AND *Kravis* are cases in which the bargaining representative merged with other labor organizations or affiliated with a large organization, the same test applies to a labor organization's disaffiliation.

Black letter Board law establishes that disaffiliation standing alone is insufficient to raise a genuine issue of representation, *Laurel Baye Healthcare of Lake Lanier LLC*, 346 NLRB 159 (2005); *New York Center for Rehabilitation Care*, 346 NLRB 447 (2006). Respondent has not advanced any other factor on which it relies for its refusal to remit fees to the Union. Moreover, this record establishes that other than disaffiliation there was no change in the relationship between the Union and unit employees or between the Union and Respondent. Nothing else changed as a result of the disaffiliation. Therefore, there has been substantial continuity of representation by the Union since the disaffiliation. Respondent is thus violating Section 8(a)(5) in refusing and failing to remit such fees.

#### Summary of Conclusions of Law

By failing and refusing since the beginning of the 2009 Major League Baseball season to remit fees deducted from its employees' paychecks to the Joint Board, as the exclusive collective bargaining representative of its vendor and concessions employees, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

#### Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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<sup>9</sup> In *Kravis*, the Board abandoned the requirement that a merger or affiliation pass a due process test. Moreover, in the instant case, Respondent has not argued that it was privileged to refuse to remit the agency fees due to a lack of due process in the Union's disaffiliation from UNITE HERE.

Furthermore, the Board has held that an employer is not justified in refusing to bargain with the collective bargaining representative of its employees on the grounds that nonmember unit employees did not participate in a merger process, *Deposit Telephone Co.*, 349 NLRB 214 (2007) citing *NLRB v. Financial Institution Employees (Seattle First)*, 475 U.S. 192 (1986).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

### ORDER

The Respondent, Cincinnati Sportservice, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing the remit fees deducted from its employees' paychecks to the Union, the Chicago and Midwest Regional Joint Board, Workers United, SEIU.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remit to the Union, the Chicago and Midwest Regional Joint Board, Workers United, SEIU, all fees deducted from its employees' paychecks pursuant to its collective bargaining agreements with the Union.

(b) On request, bargain with the Union, the Chicago and Midwest Regional Joint Board, Workers United, SEIU, as the exclusive representative of its vendor and concession employees at the Great American Ballpark.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of fees due under the terms of this Order.

(d) Within 14 days after service by the Region, post at the Great American Ballpark, Cincinnati, Ohio copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent

<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

at any time since April 1, 2009.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 22, 2010.

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Arthur J. Amchan  
Administrative Law Judge



APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with the Chicago and Midwest Regional Joint Board, Workers United, SEIU as the exclusive bargaining representative of our vendor and concessions employees at the Great American Ballpark in Cincinnati, Ohio.

WE WILL NOT fail and/or refuse to remit to the Chicago and Midwest Regional Joint Board, Workers United, SEIU fees deducted from our employees' paychecks as provided in the collective bargaining agreements covering our vendor and concession stand employees.

WE WILL remit to the Chicago and Midwest Regional Joint Board, Workers United, SEIU all such fees that we have placed in escrow since the beginning of the 2009 Major League Baseball season and all fees that we deduct in the future in accordance with the current collective bargaining agreements covering our vendor and concession stand employees.

CINCINNATI SPORTSERVICE, INC.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

550 Main Street, Federal Office Building, Room 3003

Cincinnati, Ohio 45202-3271

Hours: 8:30 a.m. to 5 p.m.

513-684-3686.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 513-684-3750

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